PRIVY COUNCIL REPORTS

CHUA LIP KONG v. DIRECTOR-GENERAL OF INLAND REVENUE

[Privy Council (Lord Diplock, Lord Russell of Killowen, Lord Bridge of Harwich, Sir John Megaw & Sir Owen Woodhouse) July 16 & October 6, 1981]

[Privy Council Appeal No. 21 of 1979]

Revenue Law — Income Tax — Profit from Sale of Land — Capital appreciation — Sabah Income Tax Ordinance, 1956, ss. 9(1) & 26(1).

Practice and Procedure — Case stated — Procedure explained.

The appellant a timber merchant and contractor purchased the leasehold interest in a piece of land on April 22, 1964 for the price of $320,000 which he borrowed on overdraft from a bank. The appellant's object in purchasing the land was to exploit in due course the marketable timber standing on it. However the appellant did not in fact extract any timber from the land during the two and a half years that it was in his leasehold ownership. On October 25, 1966 he sold the land to one Chin Yin Kee for $580,000 and the transfer of the land was registered. On the same day Chin Yin Kee sold the timber on the land to Kim Hong & Co. Ltd., a timber company for $595,000. Thereafter the land was worked as a timber concession by Kim Hong & Co. Ltd. Revenue claimed that the appellant had made a profit of $176,774 from the transaction and charged the taxpayer to tax on this sum as income derived from trading in timber. The appellant appealed to the Special Commissioners who dismissed the appeal. They held that the sale of the land to Chin Yin Khee was a fictitious sale and not *bona fide* and that in fact the appellant sold the timber obtaining in the land to Kim Hong & Co. Ltd. The appellant appealed to the High Court and the Federal Court but the appeals were dismissed — See [1978] 2 M.L.J. 197. The appellant thereupon appealed to the Yang di-Pertuan Agong.

Held, allowing the appeal: (1) the case stated by the Special Commissioners in this case fell short of the requirements of order and clarity and this led to considerable difficulties in the courts below. However once the primary facts and the assumptions of law as to the legal effect or consequences of the primary facts were disentangled the question of law could be reduced to a comparatively small compass;

(2) the Special Commissioners were not justified in holding that the sale of the land to Chin Yin Khee was not *bona fide* and was a fictitious sale and that the appellant in fact sold the timber obtaining in the land to Kim Hong & Co. Ltd.;

(3) in this case there was a purchase of land by the taxpayer, no doubt with the intention of eventually exploiting the marketable timber growing in it, and the sale of the same land at a profit two and a half years later without any exploitation of the marketable timber on it having taken place. There was no evidence that this was anything other than an isolated transaction and there was no evidence that the appellant had ever bought and sold land before or any basis upon which it would be possible to contend that among his various business activities there was included a business of dealing in land;

(4) the original purchase of the land was in law the purchase of a capital asset and the profit made by the appellant was a capital appreciation or gain and not a profit of the taxpayer's trade. It was not therefore chargeable to income tax.

Case referred to:-

(1) *Edwards* v. *Bairstow* [1956] A.C. 14, 36.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

M.P. Nolan Q.C. (*S. Woodhull* with him) for the appellant.

S.T. Bates Q.C. (*S.J. Allcock* with him) for the respondent.

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Board): This appeal is against an additional assessment of income tax for the year of assessment, 1967, made upon the appellant ("the taxpayer") on March 11, 1972, in respect of the profit of $176,774 made by him upon the sale on October 25, 1966, of an area of 6,666 acres of land ("the land") in the District of Kinabatangan, Sabah, which he had purchased in April 1964. The statute in force at the period to which the additional assessment related was the Income Tax Ordinance, 1956, (Sabah) and the section under which the assessment was made was section 9(1)(a) which reads: —

"9(1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the Colony or received in the Colony from outside the Colony in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised."

The taxpayer appealed to the Special Commissioners of Income Tax against the additional assessment upon the ground that the profit in question was capital appreciation and not a profit chargeable to tax. The Special Commissioners decided against the taxpayer and, for good measure, ordered that a sum of $23,703, which had been allowed by the Revenue as expenses incurred in connection with the sale and transfer of the land by the taxpayer in arriving at the net profit of $176,774, should be added back upon the ground that they were not expenses wholly and exclusively incurred by the taxpayer in the production of income.

From this decision the taxpayer appealed to the High Court in Borneo (B.T.H. Lee J.) by way of Case Stated under paragraph 34 of Schedule 5 to the Income Tax Act, 1967, which had by then replaced the Income Tax Ordinance, 1956. The judge dismissed the taxpayer's appeal and so did the Federal Court (Lee Hun Hoe C.J. Borneo, H.S. Ong F.J. and Charles Ho J.) upon the further appeal by the taxpayer to that court. It is from the judgment of the Federal Court that this appeal to His Majesty the Yang di-Pertuan Agong is brought.

Much of the difficulty that has arisen in the instant case — which, in their Lordships' view, is basically a simple one — has been caused by the confused way in which the case for the opinion of the High Court was stated by the Special Commissioners. At the hearing before the Commissioners there had been submitted a Statement of Agreed Facts relating to: (a) the original purchase of the land by the taxpayer on April 22, 1964, and its transfer to and registration in his name on October 7, 1964; (b) the expenses incurred by him in making improvements on the land between that date and its subsequent sale, consisting mainly of the construction of three and a half miles of narrow gauge railway from a jetty on the Kinabatangan River to the elevated portion of the land; and (c) the sale and transfer of the land to one Chin Yin Khee ("Chin") on October 25, 1966, and its registration in Chin's name on December 23, 1966. In addition to the Statement of Agreed Facts oral evidence had been

given at the hearing by the taxpayer and by two witnesses called on behalf of the Revenue.

In their Case Stated the Special Commissioners, after disposing of two preliminary objections made on behalf of the taxpayer, started quite properly and conventionally by stating in paragraph 8: —

"The following facts were admitted or proved:—"

There followed a series of paragraphs lettered (a) to (t) and containing what on the face of them appear to be statements of fact about the taxpayer's and Chin's dealings with the land, what the taxpayer had done upon the land in the two-and-a-half years between the time he bought it and the time he sold it; and in particular that his intention when he bought it had been to develop it as a cattle ranch but he had found that it was too swampy for use for that purpose and in consequence "felt very frustrated and decided to sell the property".

It is, however, quite evident from the subsequent paragraph 12, in which the Commissioners state the conclusions at which they have themselves arrived, that what they had been stating in paragraph 8 as "facts admitted or proved" consisted in the main of a summary of oral evidence given before them by the taxpayer, which, upon several matters that they regarded as vital, they had disbelieved. The conclusions which they state in paragraph 12 are all conclusions of primary fact and, for the most part in flat contradiction to facts stated in paragraph 8 to have been admitted and proved.

Paragraph 13, that follows, sets out in five numbered sub-paragraphs what purport to be the decisions of the Special Commissioners. It is in the same terms as the "Deciding Order" that they had previously made on June 14, 1974, and in respect of which they had been requested by the taxpayer to state a case for the opinion of the High Court. The first and last of these sub-paragraphs contain what could properly be described as their "decision", viz. (i) that the $176,774 that was the subject of the additional assessment was a profit from trading in timber and chargeable to tax under section 9(1)(a) of the Income Tax Ordinance, 1956, and (v) that the expenses of $23,703 incurred in connection with the sale and transfer of the land by the taxpayer to Chin were not allowable as outgoings or expenses under section 12(1) of the Ordinance. The other three sub-paragraphs of the so-called decision read as follows: —

"13. In view of the above, we decided that:—

....

(ii) the sale of the said timber land to Chin Yin Khee on October 25, 1966, was not a *bona fide* transfer of the timber land;

(iii) the sale of the said land to the said Chin Yin Khee was a fictitious sale and that the appellant on October 25, 1966, did, in fact, sell the timber obtaining in the said land to Kim Hong & Company Ltd.;

(iv) the appellant, being a timber merchant and contractor, made the said profit from the sale of the timber obtaining in the said timber land to the said Kim Hong & Co. Ltd.;".

These would appear to be inferences of fact or law or of mixed fact and law relied upon by the Commissioners as justifying their decisions in sub-paragraphs (i) and (v), and drawn by them from the primary facts they had already found in so much of paragraph 8 as is not contradicted in paragraph 12, and in paragraph 12 itself.

Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".

From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law. It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: viz. — whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

In a Case Stated summaries of the rival contentions of the parties should follow the Commissioners' statement of primary facts admitted or proved and of any inferences that the Commissioners have drawn therefrom in arriving at their decision. The summaries should be restricted to the parties' contentions of law; they should not include, as paragraphs 9 and 10 do in the instant case, arguments of the parties directed solely to the reliability of the evidence heard by the Commissioners and inferences of pure fact that ought to be drawn from it. These are not arguments that are for consideration by the court; they deal with matters that are for decision by the Commissioners alone.

The Case Stated that is the subject of the instant appeal fell far short of the requirements of clarity and order that their Lordships have indicated are desirable; and this has led to considerable difficulty in the courts below and before their Lordships, in disentangling

from one another what were the primary facts that were agreed by both parties and what were those that the Commissioners upon conflicting evidence had found to be proved, what inferences the Commissioners had drawn from those primary facts in reaching their decision and what assumptions of law as to the legal effect or consequences of particular primary facts underlay those inferences. In their Lordships' view, however, once these have been disentangled the question of law can be reduced to a comparatively small compass.

That there should be any need for disentanglement may well be largely the fault of the taxpayer himself. This is partly because the transaction by which he disposed of the land in October 1966, and other transactions that were entered into contemporaneously were complicated — it may be unnecessarily so if their purpose were to minimise the risk of incurring liability to income tax upon the amount by which the sum that he received for the land exceeded its cost price to him in 1964 plus the amount that he had expended on improvements to it. But more particularly it was because he was found by the Commissioners to have lied to them in saying that he bought the land with the intention of developing it as a cattle ranch and not for disposing of the commercial timber standing on it.

The Revenue, however, have not at any stage in the proceedings sought to assess the taxpayer under section 26(1) of the Income Tax Ordinance, 1956 which allowed the Commissioner of Inland Revenue to disregard for the purposes of assessment any transaction which reduced or would reduce the amount of tax payable by any person if in the Commissioner's opinion it was artificial or fictitious. The assessment under appeal is based simply and solely upon section 9(1)(a) and the only questions of law are whether upon the primary facts either agreed between the parties or found by the Special Commissioners (i) the sum of $176,774 was income derived from gains or profits from the taxpayer's trade as a timber merchant, and (ii) the expenses amounting to $23,703 incurred by the taxpayer in connection with the sale and transfer of the land to Chin were expenses or outgoings wholly and exclusively incurred in the production of his income as a timber merchant.

Such of the primary facts found by the Special Commissioners as in their Lordships' view are sufficient to enable these two questions to be answered can be stated briefly. Although the taxpayer had some minor business interests in cattle farming, and rubber and coconut estates, these can be ignored. His principal business was that of timber merchant and contractor — mainly, it would appear, felling standing timber belonging to others and hauling the trimmed logs to a delivery point. This accounted for some 90% of his gross income during the three successive years ended June 30, 1964, 1965 and 1966 during which he owned the land; but in two of the three years there were some very minor sales of timber on his own account.

On April 22, 1964 the taxpayer purchased the leasehold interest in the land from the Sabah Timber Co. Ltd., the original lessee, for a price of $320,000, which the taxpayer borrowed on overdraft from his bank. The land was transferred to and registered in the taxpayer's name on October 7, 1964. The taxpayer's object in purchasing the land was to exploit in due course the marketable timber standing on it. It was virtually worthless for any other purpose. After acquiring the land the taxpayer constructed on it a narrow-gauge railway from the only means of access, a jetty on the Kinabatangan River, to the higher part of the land where alone marketable timber was growing. This railway subsequently turned out to be unsuitable for use in hauling logs to the point of shipment at the jetty, but in view of the findings of fact of the Special Commissioners it must be accepted that that was the purpose for which the taxpayer constructed it.

Apart from the sleepers used in the construction of the railway the taxpayer did not extract from the land any marketable timber during the two-and-a-half years that it was in his leasehold ownership. By a transfer dated October 25, 1966, and registered December 23, 1966, he sold and conveyed it to Chin for the sum of $580,000 for the land together with additional sums totalling $35,000 for the equipment on the land and part expenses in connection with the sale and transfer. Of the sale price of $580,000, $380,000 was payable immediately and $200,000 by an identified cheque post-dated six months and guaranteed by two directors of a timber company, Kim Hong & Co. Ltd. ("the timber company"). The fact that this sale and transfer took place and was duly registered in the Land Registry, though not the detailed method of payment, is included in the Statement of Agreed Facts; and necessarily so from the Revenue's point of view, because it was upon the profit on this very sale that it was seeking to tax the taxpayer by the additional assessment that was the subject of the appeal to the Special Commissioners. The Special Commissioners, in their Lordships' view, were not entitled to go behind this statement. It was not merely part of the evidence before them which they were entitled either to accept or to reject as they thought fit.

It is this sale and transfer of which the Special Commissioners are speaking when they say in paragraph 13(ii) and (iii) of the Case Stated:

> "(ii) the sale of the said timber land to Chin Yin Khee on October 25, 1966, was not a *bona fide* transfer to the timber land;
>
> (iii) the sale of the said land to the said Chin Yin Khee was a fictitious sale;"

and follow this up by saying that:

> "the appellant did, in fact, sell the timber obtaining in the said timber land to Kim Hong & Company Ltd."

Whatever the Special Commissioners in this context meant by a "*bona fide*" transfer, and a "fictitious" sale as contrasted with a sale "in fact", these subparagraphs, which are included in what are described as their decisions, are based on the surrounding circumstances of the sale and transfer of the land to Chin and the method in which it was financed. On the same day as the sale and transfer to him, Chin as owner of the leasehold interest in the land sold the commercial timber standing on it to the timber company with licence to enter on the land and fell the timber and remove it. The consideration for this sale

of timber was $595,000. Of this sum $395,000 was payable to Chin immediately and the balance of £200,000 was payable by the identical post-dated cheque by which Chin had agreed to pay the deferred balance of the purchase price of the land to the taxpayer. To complete the history of the matter the timber company over the next five years extracted some 1½ million cubic feet of marketable timber from the land. This represented all the timber that was commercially extractable. Rather more than half way through this period, in September 1969, Chin sold the whole 6,666 acres, encumbered by the timber company's right to remove all the commercial timber, to one of tne directors of that company, Tan Kim Ting, who had guaranteed the post-dated cheque in 1965. The sale price was a mere $8,000.

No doubt the same economic result could have been achieved on October 25, 1966, by the taxpayer retaining his ownership of the land and selling the commercial timber standing on the land directly to the timber company at a price of $395,000 (out of which he paid to Chin $15,000 by way of commission plus the guaranteed cheque for $200,000); though this would not explain why Chin and not the taxpayer received in 1969 the purchase price of $8,000 for the land itself denuded of its commercial timber when it was sold to Tan Kim Ting. But the transaction was not carried out in this way and if, in the passages of the Case Stated that have just been cited, the Special Commissioners were intending to say that it was, this is a conclusion of law which cannot be supported by the primary facts which were admitted or held by the Special Commissioners to have been proved. As their Lordships have pointed out it was an agreed fact and was the whole basis of the Additional Assessment that the sale and transfer of the land by the taxpayer to Chin on October 25, 1966 did take place. It was supported by the documents and by the entries in the Land Registrar. If by saying that the transfer of the land to Chin was not "*bona fide*" the Commissioners meant that the transfer of the land to Chin before the commercial timber on it was sold to the timber company was in order to avoid a possible liability to income tax, this is irrelevant; a taxpayer is still entitled to arrange his affairs in such a manner as to attract the minimum liability to tax, subject to the power of the Commissioner of Inland Revenue to disregard certain kinds of transactions under section 26 of the Ordinance, which, however, is not relied on by the Revenue in the instant case. If by calling the sale of the land to Chin "fictitious" the Special Commissioners meant that documents constituting the contract of sale and effecting the transfer of the land to Chin were not acted upon, that is not open to them upon the Statement of Agreed Facts and is contradicted by the registration of Chin's name in the Land Registry as proprietor of the leasehold interest in the land.

Finally and most importantly, for this is the whole basis on which the Special Commissioners held that the profit made by the taxpayer, in the purchase and sale of the land, was a profit from his trade as a timber merchant, is their statement that the taxpayer "on October 25, 1966, did, in fact, sell the timber obtaining in the said land to Kim Hong & Company Ltd.". This statement although couched as a statement of pure fact embodies also a conclusion of law. Whether what persons write or say or do has the effect of transferring real or personal property from one person to another by way of sale is a question of law. Either the statement means that the primary facts as agreed by the parties or found by the Commissioners to be proven had effect in law as a sale by the taxpayer of the standing timber on the land to the timber company; in which case it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable Special Commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards* v. *Bairstow*.[1] It is a conclusion or decision of the Special Commissioners which the High Court was entitled to and ought to have set aside.

So one is left with a purchase of land by the taxpayer, no doubt with the intention of eventually exploiting the marketable timber growing on it, and the sale of the same land at a profit two-and-a-half years later without any exploitation of the marketable timber on it having taken place. There is no evidence that this was anything other than an isolated transaction; there is no evidence that the taxpayer had ever bought and sold land before, or any basis upon which it would be possible to contend that among his various business activities there was included a business of dealing in land.

In their Lordships' view, the original purchase of the land was in law the purchase of a capital asset and the profit made by the taxpayer on the sale of the land in October 1966 which was the subject of the Additional Assessment was a capital appreciation or gain and not a profit of the taxpayer's trade. It was not chargeable to income tax.

For these reasons their Lordships are of the opinion that the appeal should be allowed, the Orders of the Federal Court and the High Court in Borneo and the Deciding Order of the Special Commissioners set aside and the additional assessment contained in the Notice of March 11, 1972 discharged. The respondent must pay the appellant's costs of this appeal and of the appeals to the High Court and the Federal Court. Their Lordships will advise His Majesty the Yang di-Pertuan Agong accordingly.

Appeal allowed.

Solicitors: *Slaughter & May; Stephenson Harwood.*